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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 72-

C & G BOAT COMPANY, INC., ET AL.,
Petitioners

Versus

CRESCENT RIVER PORT PILOTS ASSOCIATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-

C & G BOAT COMPANY, INC., ET AL.,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, C & G Boat Co., Inc., et al., pray that a *writ of certiorari* issue to the United States Court of Appeals for the Fifth Circuit to review the decision of that Court rendered on March 22nd, 1972, affirming, summarily and *per curiam,* the judgment of the District Court rendered on September 20th, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is printed in Appendix "A" hereof.

The opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division, also not yet reported, is reprinted in Appendix "B" hereof.

JURISDICTION

Original jurisdiction in the District Court was predicated upon the provisions of 28 U.S.C., §1333(1).

This Honorable Court's jurisdiction is invoked under the provisions of 28 U.S.C., §1254(1).

THE QUESTIONS PRESENTED

(1) Is there a federal doctrine of immunity from vicarious tort liability in favor of voluntarily associated ship pilots when no such immunity exists under the laws of the state in which the pilots are associated and licensed?

(2) If so, should voluntarily associated ship pilots be immune from vicarious liability for one another's torts when the laws of the state in which they are licensed do not afford such immunity to voluntary associations of other persons, including licensed professionals?

STATEMENT OF THE CASE

On April 6, 1969, the S/S UNION FAITH was in collision with the tow of the Tug WARREN DOUCET in the Mississippi River at New Orleans, Louisiana, resulting in multiple losses of life and personal injuries and extensive property damage. At the time of the collision, Kenneth H. Scarbrough, Jr., a commissioned

Crescent River Port Pilot and a member of the Crescent River Port Pilots Association, was serving as pilot of the S/S UNION FAITH. Pilot Scarbrough has been missing since the collision and is presumed dead.

As a consequence of the collision, multiple claims and actions were filed by the various interests involved, including actions by the several vessels for exoneration from, or limitation of, liability. Among the several actions were those by petitioners, being the injured crewmembers and survivors of the deceased crewmembers of the UNION FAITH, as well as the owners and underwriters of the Tug CAT & MITCH. These actions were brought against the estate of Pilot Scarbrough and the Crescent River Port Pilots Association, the latter having been alleged to be, ". . . an organization, partnership, association or other legal entity organized under the laws of the State of Louisiana" and responsible, along with Pilot Scarbrough, for the latter's tortious acts. The Crescent River Port Pilots Association defended alleging in its answer that it was a Louisiana corporation of which, ". . . nearly all licensed and commissioned Crescent River Port Pilots are stockholders," that it ". . . performs certain functions for the account of its stockholders," that the individual pilot members had no "relation" with it, and that it was not responsible for the negligent acts and omissions of its individual pilot members, in particular, Pilot Scarbrough.

Following completion of discovery the association moved for summary judgment on the ground that, as a matter of law, it was not and could not be held legally liable for the negligent acts or omissions of an individual pilot member of the association. Thereafter, petitioners, with

leave of Court, filed supplemental and amended complaints joining, as additional parties defendant, respondents, each of whom was a Crescent River Port Pilot and, together with Pilot Scarbrough, a fellow stockholding member of the Crescent River Port Pilots Association at the time of the collision. Petitioners contended that this collective group of individual pilots, separate and apart from the corporate entity known as the "Crescent River Port Pilots Association," constituted an "ordinary partnership" under Louisiana law whereunder each partner may be held liable for his proportionate share of the damages caused by the negligence of a co-partner. Respondents appeared individually and moved for summary judgment dismissing the actions brought against them and adopted, in support of their motions, the same legal position taken by the corporate Crescent River Port Pilots Association in connection with its motion for summary judgment.

After hearing the respective parties and considering the various briefs and documents filed, the District Court found and concluded that the individual respondents were engaged as an "ordinary partnership" in the business of piloting vessels and that, under Louisiana law, each of the partners would be liable for his virile share of any damages negligently inflicted by a fellow-partner.

However, considering itself bound by a decision of the United States Court of Appeals for the Fifth Circuit,[1] interpreting this Honorable Court's 1906 decision in *Guy v. Donald*,[2] the District Court held that a judicially

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1 *Dampskibsselskabet Atalanta A/S, et al. v. United States*, (CCA 5, 1929) 31 F. 2d. 961.
2 203 U.S. 399, 27 S.Ct. 63, 51 L.Ed. 245 (1906).

created doctrine of immunity for the individual members of pilot associations precluded the application of Louisiana partnership law to these individual respondents and granted their motions for summary judgment of dismissal.

On appeal, petitioners did not challenge, and do not here challenge, either the Findings of Fact or the Conclusions of Law upon which the District Court predicated its dismissal judgments. It was petitioners' position on appeal that the Court of Appeals' *Atalanta*[3] decision, by which the District Court felt bound, had misinterpreted *Guy v. Donald* and, in so doing, had ignored both the statutory and decisional law of Louisiana which has never exempted or insulated Louisiana pilots voluntarily engaged in a common endeavor from liability for one another's negligent piloting. Accordingly, petitioners sought to have the Court of Appeals re-examine its decision in *Atalanta* in the light of the findings and conclusions of the District Court and to apply the Louisiana law of vicarious tort liability of "ordinary partners" in deciding the legal responsibility of respondents. This the Court of Appeals declined to do and, via summary and *per curiam* opinion held ". . . that the judgment of the District Court in this matter is correct. See *C & G Boat Co., Inc., et al. v. Crescent River Port Pilots Association, et al.*, E.D. La. 1972, ... F. Supp. ....." It is for a review of that holding and the judgment entered thereon that this petition for a writ of certiorari is filed.

REASONS RELIED ON FOR GRANTING OF THE WRIT

By affirming the judgment of the District Court and implicitly approving the reasons therefor, the Court of

[3] *Supra*, note 1.

Appeals for the Fifth Circuit has perpetuated an erroneous interpretation of the rule of law announced by this Honorable Court in *Guy v. Donald*, thereby establishing a universal principle or doctrine that all pilot associations and individual pilots, irrespective of state law, are clothed with immunity from tort liability for each other's negligence. Such a doctrine or principle, applied to the respondents in this case, is in direct conflict with the applicable law of the State of Louisiana relative to the rights and liabilities of "ordinary partners." It constitutes federal regulation of pilots and pilotage and, therefore, is a federal intrusion into an area historically and traditionally reserved to the several states. For this reason petitioners respectfully submit that their petition merits favorable consideration.

ARGUMENT

This Honorable Court has not had occasion to examine, review or explain its 1906 decision in *Guy v. Donald*. Interpretation of that case has thus far reposed in the lower federal courts. The United States Court of Appeals for the Fifth Circuit, when faced with the task of interpreting *Guy v. Donald*, decerned in *Atalanta* a "fundamental principle" that pilots' associations were exempt from liability for the negligence of their members in performing their duties as pilots, regardless of whether or not such associations were voluntary partnerships. The Court's comments on this issue were relatively brief and, under the circumstances, the Court made no effort to examine the nature and legal makeup of the Association of Pilots there involved, in order to ascertain the liabilities imposed by Louisiana law upon ordinary partners.

Petitioners respectfully urge, as they urged in their appeal to the Court of Appeals in this case, that the Court's decision in *Atalanta* misinterpreted this Court's holding in *Guy v. Donald* and placed a broad and far-reaching interpretation on the rule announced by Mr. Justice Holmes, far beyond the scope intended and far beyond the facts upon which the Holmes opinion was based.

Petitioners respectfully submit that a careful reading of *Guy v. Donald* will disclose its true "rule" to be that the law will not impose accepted partnership liabliities on persons whose partnership is not the result of their *voluntary* association with each other, that is, when the partners are *forced* by operation of law to associate and are, therefore, *unable to choose* their associates *or to rid themselves* of an undesirable one of their number *by their private collective action.*

In *Guy v. Donald*, Mr. Justice Holmes was dealing solely and only with the pilots of the State of Virginia, about whose association the Justice observed:

> ". . . the implication is plain that a condition of the [pilots'] association being permitted by the board [of commissioners] to exist is that every pilot belongs to it. * * * It is still plainer that the only provision for expulsion is that which would follow upon a pilot's being deprived of his license." 27 S.Ct., p. 65.

Thus, petitioners respectfully submit that this Court's holding in *Guy v. Donald* was never intended to establish the legal proposition that, under *federal* law, all individuals engaged in the pilotage of vessels and regardless of the nature of their association or law of the state

wherein they ply their trade, are immune from tort lability for one another's negligent piloting.

Accepting, for the sake of argument, the holding of the District Court and Court of Appeals, that this Court in *Guy v. Donald* did intend to judicially create a federal doctrine of immunity for pilot associations and individual pilots, petitioners respectfully submit that to establish such a principle and to grant such tort immunity, contrary to the laws of the several states, and in this case, the law of the State of Louisiana, contravenes the consistent Congressional policy of committing the regulation of pilots and pilotage in state territorial waters exclusively to the several states. 46 U.S.C.A. §211.[4] In the case of Louisiana, state legislation has controlled the activities and appointments of pilots since 1805, even before the territory was admitted to the Union. See *Kotch, et al. v. Board of River Port Pilot Commissioners for the Port of New Orleans*, 330 U.S. 552, 67 S.Ct. 910 (1947).

Conspicuously absent, however, from Louisiana legislation and Louisiana jurisprudence is any provision or decision from which it may be inferred that vicarious tort or other immunity was intended for pilots, as distinguished from other state licensees, professional or otherwise.

As a matter of fact, affirmative legislation of the State of Louisiana creating the status of respondents in this case provides in pertinent part:

---

[4] Act Aug. 7, 1789, c.9, §4, 1 Stat. 54: Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose.

> "The said River Port Pilots *may* form themselves into an Association as to them may seem fit, *not in conflict with law*, or with the rules and regulations of the River Port Pilots Commissioners, but nothing herein shall affect any Association presently existing." (Emphasis Added). La. Rev. Statutes of 1950, 34:995.

Moreover, 23 years before this Honorable Court decided *Guy v. Donald*, the Supreme Court of Louisiana held that no law of that state inhibits in any way the formation by commissioned pilots of a private partnership among themselves. *Levine v. Michel*, 35 La.Ann. 1121 (1883).

Therefore, it is entirely understandable and appropriate that the District Court in the instant case concluded in part as follows:

> "There is little doubt that the 'partnership business' of these individuals [respondents] is the piloting of vessels, nor can there be any doubt that the alleged negligence of their fellow-partner, Pilot Scarbrough, occurred 'in the course of' that business. *Therefore, under Louisiana law, each partner would be liable for his virile share of the negligently inflicted damages* in this case."[5]

Accordingly, if it is necessary or appropriate that Louisiana pilots enjoy immunity from tort liability for one another's neligence, an immunity not enjoyed by the members of any other Louisiana partnership or association, then, respondents respectfully submit that it is up to the State of Louisiana, not the federal Courts, to establish such an immunity.

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[5] Trial Court's Conclusions of Law No. 6. Appex. "B."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted, to the end that its judgment in this cause will be reviewed, will be vacated and set aside and this cause will be remanded to the United States District Court for the Eastern District of Louisiana with instructions to set aside its judgment of dismissal in favor of respondents herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the bar of this Court, do hereby certify that I have served two copies of the foregoing Petition for a Writ of Certiorari upon Joseph W. Nelkin, Esq., attorney for all respondents and interested parties in the Court of Appeals, by mailing the same to him, postage pre-paid, at 2008 International Trade Mart Building, #2 Canal Street, New Orleans, Louisiana, 70130, this ..... day of June, 1972.

Samuel C. Gainsburgh

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CRCUIT

No. 71-3264
Summary Calendar*

C & G BOAT COMPANY, INC., ET AL.,
Plaintiffs-Appellants,

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 22, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: We conclude that the judgment of the district court in this matter is correct. See *C & G Boat Co., Inc., et al. v. Crescent River Port Pilots Association, et al.*, E. D. La. 1972, ...F. Supp.....

AFFIRMED.

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* Rule 18, 5th Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

APPENDIX B

(Filed Sept. 21 1971)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

NO. 69-874 Civil Action
Section "G"

IN THE MATTER OF THE COMPLAINT OF CHINA UNION LINES, LTD., AS OWNER OF THE STEAMSHIP UNION FAITH FOR EXONERATION FROM OR LIMITATION OF LIABILITY

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THIS COURT'S ORDER GRANTING THE MOTION OF CRESCENT RIVER PORT PILOTS ASSOCIATION, DEFENDANT, AND THE INDIVIDUAL MOTIONS FOR SUMMARY JUDGMENT OF PILOTS GLENN F. ADAMS THROUGH JAMES D. WINSTON, INDIVIDUAL DEFENDANTS

On April 6, 1969, the S/S UNION FAITH was in collision with the tow of the Tug WARREN DOUCET in the Mississippi River at New Orleans, Louisiana resulting in loss of life, personal injuries and extensive property damage. At the time of the collision Kenneth H. Scarbrough, Jr., a commissioned Crescent River Port Pilot and a member of The Crescent River Port Pilots Association,

was serving as pilot of the S/S UNION FAITH. Pilot Scarbrough has been missing since the collision and is presumed dead.

Subsequent to and as a result of the collision, claims were made and a multitude of actions were filed in this Court by the various interests involved including actions by the several vessel interests for exoneration from a limitation of liability. Among the several actions brought were those by the injured crew members and the survivors of the deceased crew members of the UNION FAITH (Civil Action 70-821 and 70-2337), as well as by the owners and underwriters of the Tug CAT & MITCH (Civil Action 70-806) against the estate of Pilot Scarbrough and the Crescent River Port Pilots Association, the latter having been alleged to be, ". . . an organization, partnership, association or other legal entity organized under the laws of the State of Louisiana" responsible along with Pilot Scarbrough for the latter's tortious acts. Following service of process, the Crescent River Port Pilots Association appeared, and, by answer, alleged that it was a Louisiana corporation of which, ". . . nearly all licensed and commissioned Crescent River Port Pilots are stockholders", and which ". . . performs certain functions for the account of its stockholders, which functions consist of providing a joint vehicle for the ownership and operation of pilot station, pilot books and pilot equipment, providing central facilities for receiving orders for piloted services, affording an orderly system of dispatching pilots to vessels requiring such services, providing a centralizezd billing and bill collection service, and providing for the uniform and orderly administration of the affairs of the individual pilots who pilot specific vessels over the pilotage waters."

Following completion of initial discovery by way of interrogatories propounded to it, the defendant association moved for summary judgment on the ground that, as a matter of law, it was not and could not be held legally liable for the negligent acts or omissions of an individual pilot member of the association. Thereafter, the several plaintiffs, with leave of Court, filed supplemental and amended complaints joining as additional parties defendant each of the Crescent River Port Pilots who, together with Pilot Scarbrough, were fellow stockholding members of the Crescent River Port Pilots Association at the time of the collision. The several plaintiffs allege and contend that this collective group of individual pilots, separate and apart from the corporate entity known as the "Crescent River Port Pilots Association", constitute an "ordinary" partnership under Louisiana law by reason of which each of the individual pilots of that partnership may be held liable for his proportionate share of the damages allegedly caused by the negligence of their co-partner, Pilot Scarbrough. The pilots appeared individually and moved for summary judgment dismissing the actions brought against them adopting in support of their motions the identical contentions advanced and legal position taken by the corporate Crescent River Port Pilots Association in connection with its motion for summary judgment.

After considering the pleadings, the documents and depositions filed in connection with the motions for summary judgment and following a hearing on those motions, the Court, by minute entry of March 12, 1971, granted the motions for summary judgment of the Crescent River Port Pilots Association as well as those of the individual pilots and now, in connection with its grant of such motions makes the following:

FINDINGS OF FACT

1.

On April 6, 1969 and at the time of the collision between the S/S UNION FAITH and the tow of the Tug WARREN DOUCET in the Mississippi River at New Orleans, Kenneth H. Scarbrough, Jr. was serving as pilot of the S/S UNION FAITH.

2.

At the time of the collision Kenneth H. Scarbrough, Jr. was a commissioned Crescent River Port Pilot having previously received his commission from the Governor of the State of Louisiana on December 28, 1961, following examination by and upon the recommendation of the Board of River Port Pilot Commissioners, a quasi-governmental agency of the State created by statute and invested with authority to recommend to the Governor of the State the granting of commissions to deserving applicants and to institute disciplinary procedures against Crescent River Port Pilots for dereliction of duty.

3.

At the time of the collision Pilot Scarbrough was also a stockholding member in good standing of the Crescent River Port Pilots Association, a purely voluntary private organization, whose members, by virtue of its charter and not any law are all commissioned Crescent River Port Pilots. In the conduct of their affairs, the association, as well as each of the individual pilots are entirely independent of, have no legal connection with nor are they collectively subject to the control of the Board of River Port Pilots Commissioners.

4.

The corporate entity, Crescent River Port Pilots Association, is a Louisiana business corporation with its principal office in New Orleans and with a "pilot station" at Pilottown, Louisiana. As previously mentioned, it is a purely voluntary private organization composed of commissioned Crescent River Port Pilots only. However, the holding of a commission from the Governor alone does not automatically entitle a Crescent River Port Pilot to become a shareholding member in the corporation. Likewise, a shareholder in the corporation may be divested of his stock ownership and expelled from "membership" by a vote of the other shareholders and, yet, continue to retain his commission and work as a licensed Crescent River Port Pilot.

5.

The corporate entity itself, as distinguished from the individual stockholding members, has title to the several pilot boats utilized by the pilots and employs the boat personnel to operate them. It maintains and operates the "pilot station" at Pilottown. It provides living accommodations for the pilots collectively, buys their food and employs personnel to prepare and serve it. Further, it operates the New Orleans office and employs all necessary personnel to perform the numerous accounting, clerical, and administrative functions for the pilots collectively.

6.

By general rules and custom privately formulated, and not required by any law, the pilots collectively and individually, have assigned to the corporation their statutory pilotage fees, which are administered by the corporation. In this connection each month from the total fees re-

mitted to the corporation on account of pilotage services performed there is deducted the monthly "overhead" of expenses for office supplies, telephone and telegraph tolls, postage, legal and accounting fees, insurance premiums, pensions, fees and subscriptions, public relations, travel expenses, advertising, entertainment, transportation, radio repairs, meeting and elections, repairs and maintenance of the "pilot station", boat repairs, office repairs and maintenance, salary and wages of corporate employees, rent, interest on loans, storm losses and depreciation.

7.

Each month, and after deduction of the "overhead" expenses mentioned above, the net income is distributed among the several pilots belonging to the association on the basis of an agreed-to formula. The net income is calculated and distributed on the following basis: The number of "working" (not necessarily calendar) days of all of the pilots in the month in question is totaled; this total is divided into the total "net" income of the entire group and a "daily rate" of pay for the month is determined; this "daily rate" is then multiplied by the number of days that each pilot member of the association worked during the month and that product, less any fines levied against him for infraction of the pilot's own private rules, is the pilot member's distributive share of the monthly net profits.

8.

Pilotage fees from the vessels are computed upon the tonnage of the vessel and other factors rather than upon the fact that there is a pilot aboard. What a pilot receives as his monthly distributive share of net profits however is not related in any direct manner to the fees that he has

actually earned himself during that period of time. Illustratively, for the month of February, 1969, one of the member pilots, a Captain Columbo, earned *gross* pilotage fees of only $1,245.69, whereas his *net* distributive share of the earnings of all of the pilots during that period was $1,255.79 or $10.10 more than Captain Columbo personally earned, gross, in pilotage fees.

9.

All of the financial arrangements heretofore mentioned are entirely private and voluntary; only the *amount* of pilotage fees is fixed by statute. All of these other matters and details exist by reason of the private contractual undertakings of the pilots with one another in the form of their general rules and customs. Likewise, the pilots' working rules and schedules are matters of their private and mutual consent; competition between them being prohibited by their own general rules, not by law. By their mutual consent they require one another to work on a "first on the slate, next on the ship" basis. Further, and again by their mutual consent, if additional capital is required for the acquisition of common property, each pilot is obliged to put up his "by heads" share of the capital requirements.

10.

It is also to be noted that the pilots collectively do not restrict their activities or business to the piloting of vessels which by state law are required to carry a Crescent River Port Pilot aboard. They admittedly engaged in "private" as contra-distinguished from "statutory" pilotage and the fees thus earned are handled in the identical manner as fees earned for "statutory" pilotage.

CONCLUSIONS OF LAW

1.

The law respecting partnerships in Louisiana is clearly set forth in the Revised Civil Code of 1870. Article 2801 of the Code provides that a:

> "Partnership is a synallagmatic and commutative contract made between two or more persons for mutual participation and the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties."

2.

It is clear that the pilots, collectively, by and through their general rules and customs have consented voluntarily and privately to work and operate in a given manner and to share in the fruits of one another's skill, expertise and industry. They contribute equally to their common assets and share the profits of their common skill and labor on the "days worked" formula heretofore described. That they have agreed to the mutual participation and profits accruing from their skill and industry in determined proportions is clear. It is also clear that each of the pilots contemplates that a profit will be made in which each will participate in accordance with their mutual agreement or stipulation as required by Article 2811 of the Louisiana Revised Civil Code of 1870.

3.

That there are no specific written "articles of partnership" so denominated or that the pilots have not said individually or collectively nor formally written that "we declare that we are partners" would not and does not prevent their relationship from being one of legal part-

nership under Louisiana law and a legal entity separate and apart from the corporate entity denominated the "Crescent River Port Pilots Association" which conducts the internal management and administration of the partnership. *Robertson v. Lizardi*, 4 ROB 300 (La. 1843); *Pelican Plumbing Supply, Inc. v. Dixie Plumbing and Heating*, (La. App., 4 Cir. 1869) 225 F.2d 239; *Posey v. Fargo*, 187 La. 122, 174 So. 175 (1937); and *City of New Orleans v. Gautreaux*, 32 La. Ann. 1126 (1880). Indeed, a Louisiana partnership may exist by operation of law alone and even though the parties expressly disclaim an intention to form or create a partnership. As stated by the Louisiana Supreme Court in the case of *Cooley v. Broad*, 29 La. Ann. 345 (1877):

> "The only reason for doubting the existence of the partnership arises from the express declaration of the parties that no partnership was created by the act of association. They certainly did enter into an association, furnishing thereto specified capital, agreeing to divide profits and losses in fixed proportions, and engaging to carry freights and passengers for hire.";
>
> "When there exist all the conditions which, by law, create a legal relation, the effects flowing legally from such relation will follow, whether the parties foresaw and intended them or not."; "The fact that the parties had made stipulations between themselves as to their liability for each others' debts, or as to the proportion of their several responsibilities can not affect third persons, even had these stipulations been within the knowledge of such third persons." 345 at 346-57.

4.

On the basis of the facts presented herein and it is

therefore concluded that the individual pilots were, as to one another, "ordinary" partners and that collectively they were, in law, an "ordinary partnership" within the meaning of Articles 2824, 2825 and 2826 of the Louisiana Revised Civil Code of 1870.

5.

Article 2873 of the Louisiana Revised Civil Code of 1870 relating to the liabilities of "ordinary" partners provides that:

> "In the ordinary partnership, each partner is bound for his share of the partnership debt, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to."

This per capita responsibility includes delictual as well as contractual obligations irrespective of whether the partners have knowledge or control of the wrongful act, provided the tort was committed by one of their number "in the course of the partnership business". *Champagne v. Southern Farm Bureau Casualty Ins. Co.*, (La. App. 4 Cir., 1964) 170 So.2d 226; *Independence Indemnity Co. v. Carmichal & Woodring*, (La. App. 2 Cir., 1930) 127 Southern So. 10; *Haddad v. Endom's Transfer & Storage Co.*, (La. App. 2 Cir., 1933) 150 So. 870.

6.

There is little doubt that the "Partnership business" of these individuals is the piloting of vessels, nor can there be any doubt that the alleged negligence of their fellow partner, Pilot Scarbrough, occurred "in the course of" that business. Therefore, under Louisiana law, each part-

ner would be liable for his virile share of the negligently inflicted damages in this case. And this liability of the partners is not affected because the death of Pilot Scarbrough caused an *instanter* dissolution of the partnership. Louisiana Revised Civil Code of 1870, Articles 2876 (3), 2881 and 2873. *Johnson v. Iowa Rice Dryer, Inc.*, (La. App., 3 Cir., 1969) 226 So. 2d 194.

7.

Notwithstanding the foregoing findings and conclusions, the Court considers itself bound by the decision in *Guy v. Donald*, 203 U. S. 399, 27 S.Ct. 63, 51, L.Ed. 245 (1906) as interpreted by *Dampskibsselskabet Atalanta A/S, et al v. United States*, (CCA 5, 1929) 31 F.2d, judicially creating a doctrine of immunity for pilot associations and individual pilots, whether or not the nature of their association be characterizezd a corporation or a partnership.

8.

For the foregoing reasons, the motions for summary judgment were heretofore granted. Further, being of the opinion that there is no just reason for delay, the Clerk, pursuant to Rule 54 B of the Federal Rules of Civil Procedure is directed to enter judgment forthwith dismissing the actions filed against the Crescent River Port Pilots Association and each of the individual pilots.

(Signed) JAMES A. COMISKY
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
September 20, 1971

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IN THE
SUPREME COURT OF THE
UNITED STATES

NO. 71-1650

C & G BOAT COMPANY, INC., ET AL.,

Petitioners

VS.

CRESCENT RIVER PORT PILOTS ASSOCIATION, ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

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RESPONDENTS' BRIEF
IN OPPOSITION

TO: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

* * * * * *

Respondents, Crescent River Port Pilots Association, Et Al, respond herewith to the petition for a Writ of Certiorari, to be issued from this Honorable Court to the United States Court of Appeal for the Fifth Circuit, seeking review of the affirmance summarily and per curiam of a

summary judgment of dismissal by the District Court of Respondents from this lawsuit. Respondents pray that the request for Writ of Certiorari be denied.

ARGUMENT

Petitioners' question of the existence of a doctrine of immunity of ship pilots from vicarious tort liability was unequivocally answered in the affirmative by this Honorable Court in Guy v. Donald.[1]

The Fifth Circuit, in Dampskibsselskabet Atalanta A/S Et Al vs. United States,[2] a case on all fours with the instant litigation, applied Guy v. Donald, immunizing Louisiana pilots from vicarious tort liability, and stated its principle as follows:

> "The fundamental principle underlying the exemption of pilots associations from liability for negligence of their members in performing their duties as pilots, is that the association exercises no control over the manner in which those duties are to be performed, and, therefore, a pilot cannot be said to be an agent of the association in that respect."

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1. Guy v. Donald, U.S. Sup. Ct., 203 U.S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245 (1906)

2. Dampskibsselskabet Atalanta A/S Et Al vs. United States, C.C.A. 5, 31 F. 2d 961 (1929)

In the Atalanta decision, the Fifth Circuit denominated the entire partnership - vicarious liability argument raised herein as "immaterial" when it said:

> ". . . For the purposes of this case, it is immaterial whether a pilots' association be considered a partnership or not."

The very same arguments which these petitioners raise, relative to the applicability of Louisiana Law of Partnership to the pilots association, were made to the Fifth Circuit in Atalanta, and rejected in denying claims of vicarious liability by the defendant pilot association.

Among the circuits, there is no conflict as to the applicability of the immunity principle of Guy v. Donald, to voluntary ship pilot associations and their members. The issue of that immunity has been raised in the Second, Third and Fifth Circuits, and in certain districts. It has been uniformly maintained from 1901 to date.[3] In no case has the immunity been

3. The City of Reading and the City of Dundee, C.C.A. 3, 103 Fed. 696, 108 Fed. 679 (1901); Guy v. Donald, U.S. Sup. Ct., 203 U.S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245 (1906); The Manchioneal, C.C.A. 2, 243 Fed. 801 (1917); The Griffdu, U.S.D.C., S.D., Texas, 25 F. 2d 312 (1928); Dampskibsselskabet Atalanta A/S Et Al vs. United States, C.C.A. 5, 31 F. 2d 961 (1929); Kuhn vs. S/S Seatrain Georgia, 1963 A.M.C. 1226, U.S. D.C., S.D., N.Y. (1963); Liv General vs. Pilots Association for the Bay and River Delaware, and Henry V. Rice, and all other members for the Bay and River Delaware, U.S.

(Footnote continued on next page)

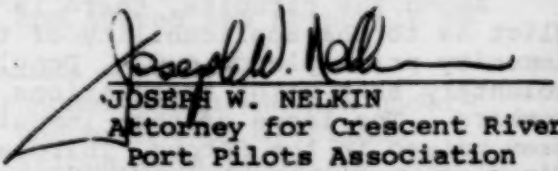
questioned even in a dissenting opinion.

Whether it be the Virginia pilots of Guy v. Donald, the Louisiana pilots of Dampskibsselskabet Atalanta A/S Et Al vs. United States, or the Crescent River Port Pilots of Louisiana herein, the immunity from vicarious tort liability is equally and uniformly applicable on the Guy v. Donald principle.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,



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Footnote No. 3 (Continued)

D.C., Del., 254 F. Supp. 447 (1966); United Fruit Company vs. Mobile Towing & Wrecking Company; Mobile Harbor Pilots Association, an unincorporated association; Mobile Harbor Pilots Association, a corporation, and Percy Manders, Jr., U.S.D.C., S.D., Ala., 177 F.S. 297 (1969).

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that I have served two copies of the foregoing brief in opposition to certiorari upon George B. Matthews, 1800 National Bank of Commerce Bldg., New Orleans, La. 70112; Samuel C. Gainsburgh, 1718 National Bank of Commerce Bldg., New Orleans, La. 70112; H. Barton Williams, 1700 Hibernia Bank Bldg., New Orleans, La., 70112; and Maurice L. Burk, 348 Baronne Street, New Orleans, La. 70112, attorneys for all petitioners, and interested parties in this application for certiorari, by mailing the same to them, postage prepaid, at their addresses above stated, this 17TH day of July, 1972.

JOSEPH W. NELKIN